

TTIP Negotiations in the Shadow of Human Rights and Democratic Values

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✉ keywords to be inserted by the indexer

Introduction

In early 2013, based on the recommendations of the EU–US, *High Level Working Group on Jobs and Growth*, the presidents of the European Council, the European Commission (the Commission) and the US announced the initiation of negotiations on a major free trade agreement between the two blocs, termed the Transatlantic Trade and Investment Partnership (TTIP).¹ The TTIP initiative promises significant economic development for the Transatlantic Free Trade Area (TFTA) and provision for investor–state dispute settlement (ISDS),² which is mainly associated with international arbitration under the International Centre for the Settlement of Investment Disputes (ICSID).³ Respondents to a public consultation on TTIP, representing a wide spectrum of EU civil society organisations, expressed concern over ISDS’s impact on EU Member States’ right to regulate in the public’s interest, if investors are armed with the right to launch international proceedings to challenge national policy.⁴ Similar concerns were expressed over the secretive nature of the negotiations, with many critics pointing to

democratic values and human rights as the bedrock of a civilised society.⁵ These concerns cast a shadow of uncertainty over the intended and unintended consequences of TTIP and, in particular, its encroachment on democratic values. In response to the rejection of ISDS, the Commission released proposals for an international investment court in August 2015.⁶ We argue that these reforms are merely cosmetic and are unlikely to alleviate some of the concerns raised over ISDS and, in particular, its intrusion on national public policy.

The aim of this article is threefold. First and foremost, it examines the nature of the TTIP proposals with particular emphasis on the international investment court. The aim is to highlight how the secretive negotiations have undermined the most basic notions of democracy such as transparency and sovereignty. Secondly, it highlights areas where the fundamental principles of human rights have been undermined by the TTIP negotiations. Thirdly, the proposal for an international investment court is critiqued, especially on the inclusion of broad fair and equitable treatment (FET) standards that are likely to promote the same unfettered rights as those found under ISDS. Ultimately, a circumspect conclusion that ties together the various strands of argument through the paper is reached.

TTIP negotiations through the lens of human rights

The controversies emanating out of the secretive nature of negotiations between the EU and the US have led the Commission to seek more transparency in the TTIP negotiations by employing a so-called “transparency initiative” in 2015.⁷ However, a closer look into the transparency initiative shows that very little information is provided to the public regarding the ongoing negotiations between the EU and the US, in the form of brief factsheets.⁸ The factsheets and negotiating texts merely indicate a summary of the proposals given out by

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¹ *High Level Working Group on Jobs and Growth*, Final Report (11 February 2013), available at: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf; European Commission (the Commission), Conceptual Paper, “Investment in TTIP and beyond—the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court” (5 May 2015); EU, “Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce”, draft document tabled for discussion with the US (12 November 2015), Ch.II: Investment, available at: http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [Both accessed 27 June 2016].

² The TTIP mandate provides for investment negotiations including ISDS Council Document No.11103/13 EU (9 October 2014), available at: <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf> [Accessed 27 June 2016]; also see Commission Concept Paper, *Investment in TTIP and beyond—the path for reform* (5 May 2015).

³ See G. van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007), Ch.7; Gus van Harten, *Sovereign Choices and Sovereign Constraints* (Oxford: Oxford University Press, 2013), Chs 1 and 4.

⁴ O. Wright and N. Morris, “British sovereignty ‘at risk’ from EU–US trade deal: UK in danger of surrendering judicial independence to multinational corporations, warn activists”, *Independent*, 14 January 2014; for commentary on the private/public rights debate see Louis T. Wells, “Backlash to Investment Arbitration: Three Causes” in C. Balchin, L.K. Chung, A. Kaushal and M. Waibel (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010), pp.341–352; N. Blackaby, “Public Interest and Investment Treaty Arbitration” in Albert van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions* (Kluwer Law International, 2003), p.355.

⁵ Wright and Morris, “British sovereignty ‘at risk’ from EU–US trade deal”, *Independent*, 14 January 2014; Friends of the Earth Europe, “The hidden cost of EU trade deals: Investor-State Dispute Settlement cases taken against EU member states” (December 2014), available at: <http://foeeurope.org/hidden-cost-eu-trade-deals> [Accessed 27 June 2016].

⁶ TTIP (12 November 2015), Ch.II: Investment

⁷ Commission, “Commission publishes TTIP legal texts as part of transparency initiative” (7 January 2015), available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1231> [Accessed 27 June 2016].

⁸ Commission, “EU negotiating texts in TTIP” (10 February 2015), available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230> [Accessed 27 June 2016].

the Commission, without discussing how these have been received or how the negotiations progress between the parties.

Attempts to block the Commission from going forward with the TTIP were made by various civil society groups, but these were unsuccessful.⁹ The “Stop TTIP” initiative¹⁰ is still actively campaigning and has received more than three million signatures and called the Commission on a number of occasions to stop the free trade agreement between the EU and the US. The initiative has criticised the Commission for failing to register it as an ECI (European Citizens’ Initiative), arguing that it violated art.11(4) of the Treaty on European Union (TEU) and arts 2(1) and 4(2)(b) of the European Citizens’ Initiative (ECI) Regulation.¹¹ Under the ECI Regulation, individuals from EU Member States can invite the Commission to submit a proposal for a legal act which they consider to be required in order to implement the EU Treaties. However, the Commission rejected the registration of the proposed citizens’ initiative entitled “Stop TTIP”.

In its response to the proposal, the Commission submitted that:

“Hence, as a matter of principle, the signature and conclusion of an international agreement with a given subject and content may be requested by a citizens’ initiative. Conversely, the preparatory Council decisions authorising the opening of international negotiations or repealing such authorisation do not fall within the scope of the Regulation.”¹²

It further pointed out that:

“[P]ursuant to Article 2, point 1 of the Regulation a citizens’ initiative may only invite the Commission, within the framework of its powers, to submit an appropriate proposal for a legal act considered necessary by the citizens for the purpose of implementing the Treaties. Conversely, a citizens’ initiative inviting the Commission not to propose a legal act is not admissible under that provision.”¹³

It is argued that the response of the Commission and its refusal to register “Stop TTIP” as an ECI is ignoring the foundational principle of the initiative which is to allow EU citizens to participate directly in the development of EU policies.¹⁴

In one of its recent reports, the Office of the High Commissioner for Human Rights (OHCHR) stated: “Trade agreements invariably affect the human rights of consumers, residents, workers, those in poverty and others, and on the ability of States to regulate and protect the human rights of their people.”¹⁵ The OHCHR highlighted that “it is essential that any proposed trade agreement is assessed in terms of its impact on human rights, including the right to health”.¹⁶

Sensitive issues that the TTIP may struggle to address, such as data protection, have already been the object of heated debates in agreements between the EU and the US. A landmark case recently decided by the European Court of Justice declared the Safe Harbour Agreement invalid and ruled that data transfer to the US is subject to the data protection requirements of EU Member States.¹⁷ Concerns over whether the Commission’s Decision 2000/520 on the Safe Harbour Agreement should be reversed had been voiced, particularly owing to the discrepancies between European and US practice, most notably the permission that US law grants public authorities to gather data under the Safe Harbour Agreement.¹⁸

One of the further concerns raised by human rights groups is that the TTIP will impede access to the right to affordable drinking water and sanitation. This right is safeguarded by a number of UN human rights instruments and is considered essential to the full realisation of all other human rights.¹⁹ In responding to concerns that the “TTIP threatens the special role of public services in sectors such as health, education, social services or water”, the Commission has briefly responded through a factsheet, stating that:

“The EU does not take any commitments for publicly funded health, education or social services. The same applies to the collection, purification and distribution of water. Member States can take any measures they wish now and in the future in these areas.”²⁰

The Commission has also added that:

“TTIP won’t affect governments’ ability to: operate public monopolies or grant exclusive rights to a particular private supplier; decide how to run water distribution services, or publicly-funded education, health or social services; or subsidise these services ... For healthcare social services and education

⁹ Stop TTIP, “Stop TTIP hands 3,284,289 signatures to Martin Schulz” (9 November 2015), available at: <https://stop-ttip.org/stop-ttip-hands-3-3-signatures-to-martin-schulz/> [Accessed 27 June 2016].

¹⁰ Stop TTIP, “Stop TTIP hands 3,284,289 signatures to Martin Schulz” (9 November 2015).

¹¹ European Parliament, “European Citizens’ Initiative”, information compiled by Petr Novak (October 2015), available at: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuid=FTU_2.1.5.html [Accessed 27 June 2016].

¹² Commission, “Your request for registration of a proposed citizens’ initiative entitled ‘STOP TTIP’” (10 September 2014), available at: <http://ec.europa.eu/citizens-initiative/public/documents/2552> [Accessed 27 June 2016].

¹³ Commission, “Your request for registration of a proposed citizens’ initiative entitled ‘STOP TTIP’” (10 September 2014).

¹⁴ European Citizens’ Initiative, Official Register, available at: <http://ec.europa.eu/citizens-initiative/public/welcome> [Accessed 27 June 2016].

¹⁵ Office of the High Commissioner for Human Rights, “Pacific Trade and the Right to Health”, p.1, available at: <http://pacific.ohchr.org/docs/PacificTradeRightToHealth.pdf> [Accessed 27 June 2016].

¹⁶ Office of the High Commissioner for Human Rights, “Pacific Trade and the Right to Health”, p.8.

¹⁷ *Schrems v Data Protection Commissioner* (C-362/14) EU:C:2015:650; [2016] Q.B. 527; [2016] 2 C.M.L.R. 2.

¹⁸ B. Treacy and A. Bapat, “Scrapping Safe Harbor: European Scare Mongering or a Real Possibility?” (2014) 15 *Privacy & Data Protection* 4.

¹⁹ UN General Assembly, Resolution 64/292, A/64/L.63/Rev.1; Committee on Economic, Social and Cultural Rights, General Comment No.15.

²⁰ Commission, “Services in TTIP (factsheet)”, available at: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_152999.2%20Services.pdf [Accessed 27 June 2016].

which receive public funding or support in any form or for services providing water for drinking, or for industrial use, governments don't have to give access to their markets to service providers from outside the EU. TTIP will not change this. Instead, governments can prevent foreign firms from providing, or investing in, these services."²¹

Despite these assurances, and in light of the secretive nature of negotiations, it is still unclear how a final agreement will affect water distribution services or whether US companies will be given access to water services as private suppliers. In more general terms, the privatisation of public services is often criticised for being capable of impacting on key economic and social rights, including the right to health, education, water and sanitation.²² To an extent, this may also affect social welfare in general through the implementation of financial measures on the import of products that are more strictly regulated in the EU than in the US, particularly genetically modified organisms (GMOs). In response to these allegations, the Commission has stated: "The EU has a strict system for deciding whether to allow companies to sell any given GMO in the EU. This is entirely separate from trade negotiations."²³

Against promises by the Commission that the TTIP would be a tool for economic growth and key to the potential creation of more jobs on both sides of the Atlantic, opponents to the trade agreement have raised concerns that it might lead to the loss of jobs. An economic assessment report prepared by the Centre for Economic Policy Research in London indicated a 0.5% rise by 2027 as a direct benefit of entering into the TTIP.²⁴ However, John Hilary, director of the charity War on Want, dismissed the findings of the report as inconclusive and warned that the treaty will actually lead to a massive loss of jobs, based on a more recent study that showed an "expected loss of around 600,000 jobs in the EU as a result of TTIP, as well as a significant reduction in labour income for workers in France, Germany, the UK and other Northern European countries".²⁵ In a report published in October 2015, the Commission pledged to respect the rights of workers. It stated that "[the Commission] wants to include provisions on labour and

environmental issues of relevance in a trade context, for increased trade and investment to improve workers' rights and environmental protection".²⁶

Turning to the current standard-setting framework for trade agreements, a potential question is whether TTIP will have an impact on the implementation of and respect for the UN Guiding Principles on Human Rights Impact Assessment and Trade Agreements 2011 and the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights 2012. For the TTIP to be an effective tool for growth, it is imperative to set out clear human rights obligations for investors and ensure adherence to international norms on corporate social responsibility. It is still unclear whether the TTIP will result in a "back-door" system where traders who fail to adhere to strict regulations can use the TTIP to obtain certification in the US—avoiding European or national regulations that would otherwise block them from trading on European soil.²⁷

TTIP negotiations and democratic values

The ongoing TTIP negotiations continue to raise a number of serious concerns which critics have, at the extreme, suggested assault fundamental notions of sovereignty and the rule of law which underpin all liberal democracies.²⁸ Aside from the motivations and content of the trade agreement, the highly secretive manner in which the negotiations are being conducted has attracted equal if not even greater criticism.

These controversies are well illustrated by the lack of information freely available to European politicians—let alone more widely to the general public—as to the substance of the negotiations. In the face of mounting criticism over the lack of transparency, the Commission has attempted to respond to some of the concerns by widening access to the TTIP texts and publishing the EU's negotiating proposals.²⁹ Starkly indicating how secretive the negotiations have been, until December 2015, approximately only 30 members of the European Parliament had been granted access to TTIP documents.³⁰ Currently, although all MEPs are granted privileged access to read TTIP documents and take hand-written notes, they can only do so in a secure reading room in

²¹ Commission, "Protecting public services in TTIP and other EU trade agreements" (13 July 2015), available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1115> [Accessed 27 June 2016].

²² World Health Organisation, "Pacific Trade and Human Rights" (2014), available at: http://www.wpro.who.int/southpacific/publications/trade_and_human_rights.pdf [Accessed 27 June 2016].

²³ Commission, "Trade—About TTIP: basics, benefits, concerns", available at: http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/questions-and-answers/index_en.htm [Accessed 27 June 2016].

²⁴ Centre for Economic Policy Research (London), *Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment* (March 2013), prepared under implementing Framework Contract TRADE10/A2/A16, available at: http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf [Accessed 27 June 2016].

²⁵ J. Hilary, "The Transatlantic Trade and Investment Partnership, 2015 update" (February 2015), available at: <http://media.waronwant.org/sites/default/files/TTIP%20booklet%20for%20RLS,%202015%20update.pdf> [Accessed 27 June 2016].

²⁶ Commission, "Report of the Eleventh Round of Negotiations for the Transatlantic Trade and Investment Partnership" (Miami, 19–23 October 2015), available at: http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153935.pdf [Accessed 27 June 2016].

²⁷ V. de Beaufort, "The European Union and the New Face(s) of International Trade" (2015) 1 *International Business Law Journal* 39.

²⁸ M.S. Cato, "I've seen the secrets of TTIP, and it is built for corporations not citizens", *The Guardian*, 4 February 2015; O. Wright and N. Morris, "British sovereignty 'at risk' from EU-US trade deal: UK in danger of surrendering judicial independence to multinational corporations, warn activists", *Independent*, 14 January 2014; G. Monbiot, "This transatlantic trade deal is a full-frontal assault on democracy", *The Guardian*, 4 November 2013.

²⁹ Commission, "Commission to further boost TTIP transparency", News Archive (19 November 2014), available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1201> [Accessed 27 June 2016].

³⁰ European Parliament, "All MEPs to have access to all confidential TTIP documents", Press Release (2 December 2015), available at: <http://www.europarl.europa.eu/news/en/news-room/20151202IPR05759/All-MEPs-to-have-access-to-all-confidential-TTIP-documents> [Accessed 27 June 2016].

the European Parliament in Brussels under exceptionally strict conditions. In order to prevent leaks, no personal possessions are allowed into the room, individuals must sign a strict confidentiality agreement, and they must be accompanied at all times.³¹ In February 2016, privileged access to TTIP documents was extended to British MPs, albeit under similar rules of confidentiality in the Department for Business, Innovation and Skills in Westminster.³² Nevertheless, critics have pointed to the secretive manner of the negotiations as a strong indication that corporate interests will trump the interests of ordinary civilians, while the most sceptical go even further. Furthermore, owing to the inherent secrecy of the negotiations, little is known about the actual content of the negotiations, save for the occasional leak and the publication of brief factsheets, negotiating texts and position papers.³³

Although the leading advocates of the negotiations reject the most extravagant criticisms as hyperbolic speculation, there remains much to be said about the lack of transparency and public participation in the negotiation process. The content of the negotiations and the manner in which the trade agreement is being drafted raise a much more fundamental question concerning the powers of the EU, and the Commission in particular, and the inherent conflict with Member States' sovereignty. If, as critics allege, the TTIP will reduce regulations and safeguards which ensure consumer product quality and environmental standards, serious doubts must be raised as to whether the sovereignty of Member States is being respected.

In that regard, one of the most persistent objections to the current proposals concerns the system of dispute resolution, which would essentially allow corporations to sue Member States or the EU itself in secretive arbitration panels for loss of profits or other action which could harm business interests. In November 2015, following an extremely critical public consultation into the ISDS model which is commonly used in similar but smaller-scale trade agreements,³⁴ the Commission revealed that it would instead pursue proposals for an investment court to be included in the TTIP.³⁵ However, responses to the proposed investment court have not been favourable, with critics among civil society suggesting that the Commission has only rebranded the ISDS system with minor improvements which do not address the most troubling concerns.³⁶

In particular, opponents suggest that the Tribunal of First Instance will comprise a judicial bench of three corporate lawyers, who would not by any standard satisfy the need for an independent and impartial tribunal for a number of reasons. For example, in a serious blow to the Commission's proposals, on 4 February 2016, the German Association of Judges published a letter arguing that the process of appointing judges and the positions of the judges themselves would not meet international standards of independence in professional and financial terms.³⁷ Regarding the concerns over the professional independence of the investment court, the judges claimed that the process of selection and appointment of judges would not be based on objective criteria in order to ensure independence. First, as the judges would only be selected from a narrow pool of experts practising in international commercial dispute resolution—ensuring that the investment court had adequate expertise in the particular legal systems of individual Member States would be difficult to achieve.³⁸ Furthermore, relying upon lawyers who are predominantly engaged in international arbitration raises concerns that the appointed judges could simultaneously be representing corporations in other proceedings. If appointed judges were in a position of representing corporations in other proceedings, it is difficult to see how this arrangement would satisfy one of the important elements of open justice, that not only must justice be done, it must also be seen to be done.³⁹ Finally, regarding the financial independence of the investment court, the judges doubted whether the relatively low “retainer fee” for the appointed judges would be sufficient to ensure the independence of the proposed tribunal.⁴⁰

Although there were initial concerns that the proposed investment court would replicate the worst shortcomings of the ISDS system by holding proceedings in secret and precluding the right of appeal or the possibility of third-party interventions, the new investment court proposals do seem to have addressed and appeased these troubling issues. The new Commission proposals ensure that proceedings will be heard mostly in open sessions, and that there will be an appeal tribunal and the possibility for third parties to intervene but only to the extent that an intervention supports one of the disputing parties.⁴¹ Nevertheless, as it stands, such an adjudicative system

³¹ Cato, “I’ve seen the secrets of TTIP, and it is built for corporations not citizens”, *The Guardian*, 4 February 2015.

³² P. Inman, “MPs can view TTIP files—but take only pencil and paper with them”, *The Guardian*, 18 February 2016.

³³ Commission, “EU negotiating texts in TTIP”, News Archive (10 February 2015).

³⁴ Commission, “The Commission to consult European public on provisions in EU–US trade deal on investment and investor-state dispute settlement”, Press Release (21 January 2014), available at: http://europa.eu/rapid/press-release_IP-14-56_en.htm [Accessed 27 June 2016].

³⁵ EU, “Transatlantic Trade and Investment Partnership (12 November 2015), Ch.II: Investment.

³⁶ Pia Eberhardt, War on Want, “The Zombie ISDS: Rebranded as ICS, rights for corporations to sue states refuse to die”, (Corporate Europe Observatory, February 2016), available at: http://media.waronwant.org/sites/default/files/The%20zombie%20ISDS.pdf?_ga=1.216396702.901736199.1455710514 [Accessed 27 June 2016].

³⁷ In addition to the concerns over the IC's structure, the German Association of Judges rejected the legal basis for the IC. See Deutscher Richterbund, “Opinion on the establishment of an investment tribunal in TTIP”, DRB Opinion No.04/16 (February 2016), available at: https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf [Accessed 27 June 2016].

³⁸ Deutscher Richterbund, “Opinion on the establishment of an investment tribunal in TTIP” (February 2016), available at: https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf [Accessed 27 June 2016].

³⁹ See *R. v Sussex Justices Ex p. McCarthy* [1924] 1 K.B. 256 KBD at 259; *Hobbs v CT Tinling & Co Ltd* [1929] 2 K.B. 1 CA; *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2)* [2000] 1 A.C. 119; [1999] 2 W.L.R. 272; 6 B.H.R.C. 1 HL.

⁴⁰ Under current proposals, judges in the Tribunal of First Instance will be paid a retainer fee of €2,000 per month plus an allowance for actual service (TTIP Draft Ch.II s.3 art.9(12)), and judges in the Appeal Tribunal will be paid a retainer fee of €7,000 per month plus an allowance for actual service (TTIP Draft Ch.II s.3 art.10(12)).

⁴¹ TTIP Draft Ch.II s.3 arts 10 and 23 respectively.

would undoubtedly undermine and conflict with the most basic requirement that courts be independent and impartial.

The decision to continue conducting the negotiations in the highest secrecy is perplexing at a time when public trust in the EU, and the Commission in particular, remains worryingly low.⁴² Furthermore, with the UK's continuing membership of the EU increasingly uncertain as a national referendum looms, and the US presidential election due to take place in November 2016, it is relatively uncertain what direction the negotiations will take in the months ahead. However, with the election of Jeremy Corbyn as leader of the Labour Party in 2015, it is quite possible that pressure upon the UK Government to lobby for a more transparent process may increase.⁴³ Having briefly assessed the quite legitimate concerns overshadowing the TTIP negotiations, it is clear that the negotiating parties must earnestly respond. If the parties genuinely desire to reach a satisfactory conclusion and acquire public confidence, one may be tempted to encourage the Commission and American counterparts to heed the wisdom of Jeremy Bentham, who warned against the dangers of secret justice:

"In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice."⁴⁴

The rights balance

Since the mid-1960s, the ICSID has offered foreign investors an impartial, international dispute settlement forum allowing them to sue host states for breach of investment protection standards often contained in investment agreements such as bilateral investment treaties (BITs).⁴⁵ ISDS brought to an end the traditional court system as a means of resolving international investment disputes by promoting international arbitration and therefore depoliticising investment disputes.⁴⁶ In November 2015, the Commission unveiled a chapter on investment with a proposal for an investment court system to be included in the TTIP with a mandate to handle

EU-US investor-state disputes.⁴⁷ They include plans for a public investment court system with an appeal tribunal composed of publicly appointed judges, modelled on the World Trade Organization's (WTO) appellant body and the International Court of Justice (ICJ).

However, it is debatable whether the inclusion of an international court system in TTIP is the answer to the challenges facing the ISDS system. This part of the article advances the argument that despite its encroachment on the democratic values and human rights highlighted above, through the international investment court system, TTIP has the potential to infuse greater balance into the private property and national interest debate. The rejection of ISDS for encroaching on regulatory autonomy provides a benchmark for judging the reforms made under the international investment court proposal.⁴⁸ Ideally, the system should provide states with the right to regulate in the national interest without fear of suits from disgruntled investors claiming breach of investment protection standards contained in TTIP. However, from the outset, it is evident that the proposal has failed to address the rights balance given that it retains the essential characteristics of ISDS.

First and foremost, under the proposed international investment court system, foreign investors would still be in a privileged position to circumvent domestic courts and bring claims directly to an international court. It remains that only foreign investors, not states or domestic investors, can launch international proceedings for breach of investment commitments. In the past, this has been met with disastrous consequences for the host state. For example, South Africa was sued for instituting a mandatory 26% ownership stake in the mining industry for black South Africans in a bid to overcome apartheid-centric inequalities.⁴⁹ Although the foreign investors ultimately dropped their claim, South Africa was left with over £3 million in legal fees to pay and the pressure of the case forced the Government to allow the Italian investors' companies to transfer only 5% of ownership to black South Africans. Thus, under the international court system, foreign investors retain

⁴² A Eurobarometer survey in spring 2015 revealed that between spring 2013 and spring 2014, 56% of respondents across all Member States tended not to trust the EU whereas just 31% of respondents tended to trust the EU. In spring 2015, those who tended to trust the EU had increased to 40% whereas 46% tended not to trust the EU. Additionally, in spring 2015, just 32% of respondents in the UK felt that the EU conjured a "positive" image. See Commission, "Public Opinion in the European Union", Standard Eurobarometer 83 (spring 2015), available at: http://ec.europa.eu/public_opinion/archives/eb/eb83/eb83_publ_en.pdf [Accessed 27 June 2016].

⁴³ Jeremy Corbyn has been sceptical of the TTIP proposals, demanding that public services be safeguarded. Furthermore, the leader of the Labour Party has been joined by the leaders of the SNP, UKIP, the Liberal Democrats, the Green Party and all major Northern Ireland parties in demanding that the National Health Service be exempt from TTIP. See, for example, Channel 4 News, "Jeremy Corbyn on TTIP, Trident and the NHS" (16 December 2015), available at: <http://www.channel4.com/news/jeremy-corbyn-on-ttip-trident-and-the-nhs> [Accessed 27 June 2016]. See also A. McSmith, "TTIP: Jeremy Corbyn, Nigel Farage, Nicola Sturgeon and Natalie Bennett sign appeal to exempt NHS from trade deal", *Independent*, 26 October 2015.

⁴⁴ *Scott v Scott* [1913] A.C. 417 HL at 477 per Lord Shaw.

⁴⁵ C. Brown, "The Development and Importance of the Model Bilateral Investment Treaty" in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013), p.4; T. Gazzini, "Bilateral Investment Treaties" in T. Gazzini and E. de Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Leiden, Boston: Martinus Nijhoff Publishers, 2012), pp.106–107.

⁴⁶ N. van den Broek, "Protection of Investors in International Trade and Investment Regime: A Practical Comparison" in J. Huerta-Goldman, A. Romanetti and F. Stirnimann (eds), *WTO Arbitration, Investment Arbitration, and Commercial Arbitration* (Kluwer Law International, 2013), p.15, p.23; Van Harten, *Investment Treaty Arbitration and Public Law* (2007), Ch.7; Van Harten, *Sovereign Choices and Sovereign Constraints* (2013), Chs 1 and 4.

⁴⁷ TTIP (12 November 2015), Ch.II: Investment.

⁴⁸ The positions of trade unions can be found on their websites, e.g. IG Metall, available at: <http://www.tradeunionfreedom.co.uk/ig-metall-demands-halt-to-ttip-negotiations/> [Accessed 27 June 2016]. See also ETUC, available at: <https://www.etuc.org/documents/etuc-position-transatlantic-trade-and-investment-partnership#.YqdyjE9Jcsk> [Accessed 27 June 2016]. The German media was critical of ISDS in TTIP; see, for example, H. Buchter, P. Pinzler and W. Ucharius, "Was handeln wir uns da ein", *Die Zeit*, 26 June 2014.

⁴⁹ *Foresti and De Carli v Republic of South Africa*, ICSID Case No.ARB(AF)/07/01.

arguably greater private property rights than those provided for under national constitutional law, which is in many ways discriminatory.⁵⁰

Secondly, by widening the scope of dispute settlement to EU–US investors, the international court system is unlikely to deter investors from launching vexatious suits; rather it indirectly promotes such action. Thus, the economic rationale for launching suits remains the same, with investors having already claimed nearly €30 billion in compensation from EU Member States through BITs and other international investment agreements.⁵¹ Thus, claims are likely to increase and ultimately it is EU–US taxpayers' money that would end up in the pockets of multinationals. While the essential characteristics of the investment court system appear eerily familiar, the continued encroachment on the social–economic policies of Member States compounds the concern.

Thirdly, as aforementioned, the proposal for ISDS was overwhelmingly rejected by the EU civil society, largely owing to its impact on national policy-making. It is evident that these concerns have not been addressed despite the introduction of a public court with elected judges to handle investment disputes. Clearly, making the forum public without changing the rules of engagement is likely to lead to the same results. As a result, there is a growing perception among the business community, academics and Member States that investors are unduly interfering in wholly democratic choices of sovereign nations.⁵² This has culminated in a number of countries withdrawing from international investment agreements that provide for investment arbitration. For example, Russia opted to withdraw from the Energy Charter Treaty in 2009 following its dissatisfaction with the *Yukos Universal* award,⁵³ and Italy withdrew six years later largely owing to fear of suits over developments in its renewable energy sector.⁵⁴ In South America, Bolivia terminated international agreements with provision for investor–state arbitration following a suit by an American

company for cancellation of their concession agreement owing to water price hikes.⁵⁵ This shows that national governments are growing tired of foreign investors suing them for policy changes that are in the national interest.⁵⁶ This is unlikely to subsist under the international investment court system simply because investors retain the same protection. Although art.2 of the Investment Chapter provides that sovereign states have a right to regulate in the public interest,⁵⁷ there is no guidance on what constitutes necessary measures or legitimate objectives, and thus it is most likely that judges at the investment court would be called upon to make that determination. Essentially, art.2 maintains the same position as its predecessor by allowing the so-called “judges” to make determinations on whether a foreign investor should be compensated for breach of substitutive protection standards.

Last but not least, this concern is exacerbated by the inclusion of broad investor protection standards such as FET and investors' legitimate expectations.⁵⁸ Although TTIP introduces some qualification on the FET standard,⁵⁹ this is unlikely to prevent expansive interpretation because the list of qualifying breaches is not exhaustive. Investors have in the past relied on these broad standards to claim against anti-smoking legislation in Australia⁶⁰ and a lawsuit against Canada over a fracking ban in Quebec,⁶¹ and thus it appears that the reform of investment protection standards is merely cosmetic. Similarly, art.3(4) of the Investment Chapter retains the legitimate expectations ground which has in the past been used as a weapon against government regulation that conflicts with foreign investor's commercial interests. For example, in *Bilcon*, an investor was able to successfully challenge national policy on the ground of legitimate expectations made through representations by the government before investing, contrary to Canada's core community values not to allow a mining and marine project owing to fears over environmental damage.⁶² Furthermore, even though

⁵⁰ See C. Tietje and F. Baetens, “The Impact of Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership”, Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry for Foreign Affairs, The Netherlands (24 June 2014).

⁵¹ Friends of the Earth Europe, “The hidden cost of EU trade deals” (December 2014).

⁵² C.H. Brower, “Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes” in K.P. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2008–2009* (Oxford: Oxford University Press, 2009), p.356.

⁵³ *Yukos Universal Ltd (Isle of Man) v Russian Federation*, UNCITRAL, PCA Case No.AA 227.

⁵⁴ Russian withdrawal from the Energy Charter Treaty, available at: <http://www.encharter.org/index.php?id=414>; L.E. Peterson, “Italy Follows Russia in Withdrawing from Energy Charter Treaty, but for Surprising Reason” (17 April 2015), *International Arbitration Reporter*, available at: http://www.iareporter.com/articles/20150417_1 [Both accessed 27 June 2016].

⁵⁵ *Guaracachi America Inc and Rurelec Plc v The Plurinational State of Bolivia* (PCA Case No.2011-17).

⁵⁶ In Europe, the right to property is laid down in Protocol I to the European Convention on Human Rights and in art.17 of the Charter of Fundamental Rights of the European Union. See L. Johnson and O. Volkov, “State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law” (2014) 5 *Investment Treaty News* 3; A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties. Standards of Treatment* (Kluwers Law International, 2009), p.322.

⁵⁷ TTIP (12 November 2015), Ch.II: Investment art.2.1: “The provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.” See *Brownlie's Principles of Public International Law*, 8th edn, edited by James Crawford (Oxford: Oxford University Press, 2012), p.448.

⁵⁸ J. Stone, “Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment” (2012) 25 *Leiden Journal of International Law* 82; R.

Dolzer, “Fair and Equitable Treatment: Today's Contours” (2013) 12(7) *Santa Clara Journal of International Law* 16.

⁵⁹ “2 A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or a series of measures constitutes:

- (a) denial of justice in criminal, civil or administrative proceedings; or
- (b) fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings; or
- (c) manifest arbitrariness; or
- (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
- (e) harassment, coercion, abuse of power or similar bad faith conduct; or
- (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.”

⁶⁰ *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No.ARB/10/7.

⁶¹ *Lone Pine Resources Inc v Government of Canada*, ICSID Case No.UNCT/15/2.

⁶² *Bilcon of Delaware v Government of Canada*, Award on jurisdiction and liability (17 March 2015), PCA Case No.2009-04.

investment courts cannot force the government to change its laws, they can order costly awards that would ultimately flow out of the public purse. Armed with an arsenal of substantive investment protection provisions in TTIP, foreign investors are likely to continue to enjoy the same unfettered rights as those found under ISDS.

In light of the aforementioned, as a way forward, the architects of TTIP should make negotiations more transparent by keeping the European Parliament informed about the developments and encouraging the involvement of civil society groups in the process. In this regard, rather than publishing brief factsheets, the Commission should publish the full negotiation documents. Furthermore, proposals for the creation of a court subsidiarity system to ensure that state parties to a dispute are able to rely on interim measures to settle disputes through mediation before resorting to the investment court should be considered.

Conclusion

Democratic and human rights concerns will inevitably arise as Western economies continue to stride in a liberalising direction by breaking down trade barriers and cutting “red tape” in the pursuit of prosperity. The extent to which states deal with these legitimate concerns remains an enduring challenge whenever business interests run the risk of overshadowing the interests of civil society. As this article has illustrated, the ongoing TTIP negotiations are proving no exception. The means of dispute settlement remains arguably the single most controversial issue of the negotiations. If the final proposals resemble the much-criticised ISDS system and hand a significant advantage to corporations in legal disputes, it is doubtful that the most fervent of sceptics will regard the TTIP deal as anything but the further erosion of sovereignty to the advantage of corporate power at the expense of civil society. Although small victories have been won by those lobbying for greater transparency, there remain many steps the negotiating parties could take to allay the apprehensions that millions of European and American citizens have towards the unprecedented trade deal.